The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-87-A March 9, 2006

Complaint of CTC Communications Corp. against Verizon Massachusetts regarding Provisioning of Unbundled Network Element Replacement Services at Tariffed Rates.

ORDER ON MOTION FOR RECONSIDERATION

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ORDER ON MOTION FOR RECONSIDERATION

I. INTRODUCTION

On March 3, 2005, the Department of Telecommunications and Energy ("Department") issued an order in D.T.E. 04-87 ("Dismissal Order") dismissing the Complaint of CTC Communications Corp. ("CTC") against Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"). CTC's request for relief sought (1) to require Verizon to continue to provide combinations of unbundled loops, switching, shared transport, multiplexing, and UNE-P ("unbundled network element platform") for enterprise customers and customers subject to the Federal Communications Commission's ("FCC's") "four-line carve-out" rule[1] (collectively, "enterprise and four-lines-or-more UNE-P") at rates and terms under Verizon's wholesale tariff, M.D.T.E. No. 17; (2) to prohibit billing imposed on CTC for charges not contained in Department-approved tariffs; (3) to require Verizon to credit CTC's account for any non-tariffed rates billed; and (4) to prohibit Verizon from terminating, disconnecting, or impairing service to CTC for its refusal to pay the disputed charges (see CTC Complaint at 1, 15). In the Dismissal Order, the Department concluded that because CTC and Verizon adopted the MCI Metro Interconnection Agreement on July 4, 2001, and because CTC's rights to the UNEs in question were within the scope of the parties' interconnection agreement ("ICA"), CTC's rights must be determined pursuant to the ICA, not under Verizon's

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[1] These include customers in density zone one in the top 50 Metropolitan Statistical Areas ("MSAs") that are provisioned with four or more DS0 lines. The four-line carve-out rule is a dividing line between mass market and enterprise customers. See 47 C.F.R. § 51.319(d)(3)(ii).

wholesale tariff. Dismissal Order at 2.[2] The Department also stated that the issue of CTC's rights under its ICA to access the UNEs in question would be addressed in Consolidated Arbitrations, D.T.E. 04-33. Id. at 3. For these reasons, the Department dismissed CTC's Complaint. Id.

On March 22, 2005, CTC filed a Motion for Reconsideration ("CTC Motion") claiming that the Department erred when it dismissed CTC's Complaint on the basis that the issues raised in the Complaint would be addressed in D.T.E. 04-33 pursuant to CTC's ICA (CTC Motion at ¶¶ 16-18). On April 11, 2005, Verizon filed its Opposition to the Motion for Reconsideration ("Verizon Opposition"). On July 14, 2005, the Department issued its Order in Consolidated Arbitrations, D.T.E. 04-33 ("Consolidated Arbitrations Order").

II. SUMMARY OF FACTS

The following facts are undisputed. The parties agree that on May 18, 2004, Verizon notified all Massachusetts competitive local exchange carriers ("CLECs"), including CTC, that Verizon was discontinuing its provision of enterprise and four-lines-or-more UNE-P as a result

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[2] In the Dismissal Order at 3, the Department also noted that the Department approved Verizon's withdrawal of the enterprise switching UNE from its tariff M.D.T.E. No. 17 in Consolidated Order, D.T.E. 03-60/04-73, at 71-72 (2004).

of the FCC's Triennial Review Order[3] (CTC Complaint at ¶¶ 8, 10, Exhs. 1, 3; Verizon Answer at 3). In its notice to the CLECs, Verizon offered to work with CLECs to migrate existing enterprise and four-lines-or-more UNE-P arrangements to alternative (i.e., "replacement") services prior to August 22, 2004 (the date selected by Verizon for UNE discontinuance) (CTC Complaint, Exhs. 1, 3; Verizon Answer at 3). Verizon offered CLECs the option of obtaining UNE replacement services through resale under 47 U.S.C. § 251(c)(4), or to enter into commercial negotiations to establish alternative service arrangements (CTC Complaint, Exhs. 1, 3; Verizon Answer at 3). Verizon also made clear that if a CLEC chose neither of these options, Verizon would automatically begin billing any enterprise and four-lines-or-more UNE-P arrangements existing as of August 22, 2004, at rates Verizon asserted were equivalent to the resale rate (CTC Complaint at ¶¶ 8, 10, Exhs. 1, 3; Verizon Answer at 3). Verizon indicated that it would effect this arrangement by means of a surcharge added to applicable enterprise and four-lines-or-more UNE-P rates (CTC Complaint, Exhs. 1, 3; Verizon Opposition at 3).[4] The parties agree that, on July 2, 2004, Verizon sent follow-up letters to CLECs, including CTC, listing the surcharges that Verizon intended to begin

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[3] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98; Deployment of Wirleline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 01-36 (rel. Aug. 21, 2003) ("Triennial Review Order"), vacated in part and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

[4] For ease of reference, we refer to this option as the "default" arrangement throughout this Order.

assessing post-August 22, 2004 for the default arrangement (CTC Complaint at ¶¶ 9, 12, Exhs. 2, 4; Verizon Answer at 4).

The parties also agree that CTC did not enter into a resale arrangement or a commercial alternative service arrangement for enterprise and four-lines-or-more UNE-P replacement services prior to August 22, 2004, and neither party has indicated to the Department that they have done so since. Therefore, as of August 23, 2004, Verizon has been implementing the default arrangement, under which Verizon has been providing to CTC enterprise and four-lines-or-more UNE-P replacement services for those arrangements in place in August 2004 and has been billing CTC the surcharge rates referenced in Verizon's July 2, 2004 industry letters (CTC Motion at ¶ 22; Verizon Opposition at 6).

III. MOTION FOR RECONSIDERATION

A. Positions of the Parties

1. CTC

CTC raises two objections to the Department's Dismissal Order. First, CTC claims that the Department mistakenly concluded in the Dismissal Order that CTC's rights are to be determined under the parties' ICA rather than under Verizon's tariff obligations (Motion at ¶ 16). CTC claims that Verizon itself maintains that CTC currently has no right to obtain UNE-P under the parties' ICA, and that Verizon seeks to impose UNE-P replacement products and charges on a common carrier basis (id. at ¶¶ 16-18). CTC claims that the Department mistakenly concluded that the issue of access to the services in question would be determined in D.T.E. 04-33, and argues that because there is no longer a § 251 obligation to provide such

UNEs, the terms for UNE-P replacement products would not be addressed in the Department's arbitration proceeding (id. at ¶ 18). Second, CTC argues that the Dismissal Order failed to recognize that Verizon's UNE-P replacement products must be tariffed and that the issue of Verizon's obligation to tariff such terms would not be addressed in the Consolidated Arbitrations proceeding in D.T.E. 04-33 (id.).

In its Motion, CTC requests that the Department reconsider its Dismissal Order and (1) require Verizon to file tariffs for its enterprise and four-lines-or-more UNE-P replacement services; (2) prohibit Verizon from billing CTC for UNE-P or functionally equivalent services not contained in the tariff; (3) require Verizon to credit CTC for any non-tariffed rates or surcharges billed to date; and (4) prohibit Verizon from terminating, disconnecting, or impairing service to CTC for its refusal to pay the disputed charges (id. at 14).

2. Verizon

Verizon argues that the Dismissal Order was correct because the parties' ICA indisputably addresses the parties' UNE-P rights, and, therefore, CTC cannot avoid its contractual agreement by purchasing out of M.D.T.E. No. 17 (Opposition at 9). Moreover, Verizon states that it is undisputed that M.D.T.E. No. 17 no longer provides for the purchase of enterprise UNE-P and related services (id.). Verizon disputes CTC's assertion that the Department mistakenly dismissed the Complaint on the assumption that the issues raised by CTC would be addressed in D.T.E. 04-33 (id.). Verizon states that the Department never ruled that the terms for non-Section 251 elements would be arbitrated in D.T.E. 04-33, because the only issue before the Department on CTC's Complaint was whether CTC could

purchase § 251 UNE-P arrangements out of M.D.T.E. No. 17 (id. at 9-10). Verizon argues that the Dismissal Order was correct, because "unbundled access to network elements under Section 251 – the only kind of elements at issue in this case" was to be decided in D.T.E. 04-33 (id. at 10). In any event, Verizon maintains that the Department's statement in the Dismissal Order regarding the scope of D.T.E. 04-33 is mere dicta, and whether or not the Department did address the UNEs in question in D.T.E. 04-33, CTC still could not purchase those UNEs out of M.D.T.E. No. 17 (id.).

Verizon disputes CTC's claim that Verizon must tariff the surcharges that it imposes upon CLECs to bring former enterprise UNE-P arrangements to the level of Verizon's resale rates for similar arrangements under Verizon's resale tariff, M.D.T.E. No. 14 (id. at 10-11). Verizon states that because CTC failed to convert its enterprise services to lawful arrangements after enterprise switching was delisted,[5] Verizon is applying surcharges based on the approved resale discount, rather than terminating services and disrupting service to CTC's end-user customers (id. at 11-12). Verizon further maintains that if a CLEC concludes that the surcharges exceed the rate that it could obtain by ordering the resold service, the CLEC is free to order the resold service; thus, Verizon has no ability to impose surcharges that exceed § 251(c)(4) resale rates (id. at 12).

Verizon also contends that the surcharge offering was not an offer to serve the CLECs' embedded base of enterprise UNE-P arrangements with a new service, nor was it intended or

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[5] When a UNE is "delisted" by the FCC, incumbent LECs, such as Verizon, no longer are required to offer that network element to CLECs at Total Element Long-Run Incremental Cost ("TELRIC") pursuant to 47 U.S.C. § 251.

designed to satisfy any obligations that it may have to make enterprise switching available under 47 U.S.C. § 271 (id. at 14). Verizon argues that it has no obligations to offer UNE-P under § 271, and that § 271 does not require Verizon to offer services at resale rates (id.). Verizon states that it intends to satisfy its § 271 obligations by "enter[ing] into commercial negotiations for alternative service arrangements that may offer certain advantages over resale . . ." (id. at 15). Thus, Verizon claims that it has offered to provide § 271 enterprise switching services through individually-negotiated contracts, not as common carriage (id. at 16).

B. Standard of Review

The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the

first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

C. Analysis and Findings

1. Introduction

As discussed below, we determine that in the Dismissal Order, the Department correctly concluded that CTC could not purchase UNEs out of Verizon's wholesale tariff when the parties' ICA contained specific provisions governing UNE availability. Moreover, the Department also correctly stated that because the Consolidated Arbitrations proceeding, D.T.E. 04-33, included an evaluation of CTC's rights under its ICA to obtain UNEs post-Triennial Review Order, there was no reason to address these issues in a separate proceeding. However, we agree with CTC's Motion that the Department did not address in the Consolidated Arbitrations proceeding the terms under which Verizon provisions UNE-P replacement services (i.e., the services at issue in CTC's Complaint) or whether these services must be tariffed. Because the Department did not fully address the claims raised in CTC's

Complaint, we deem partial reconsideration of the Order dismissing this proceeding is appropriate.[6]

2. The Relationship Between Tariffs and Interconnection Agreements

In approving Verizon's tariff M.D.T.E.No. 17, and subsequent tariff revisions, the Department has never directed that those tariff provisions trump those of existing ICAs. Dismissal Order at 2. In other words, a carrier cannot avoid the terms of its ICA by purchasing out of a tariff when the ICA addresses access to the services sought to be purchased from the tariff. However, a carrier may purchase services from a tariff when its ICA does not govern access to the services sought to be purchased. The terms and conditions of Verizon's wholesale tariff represent a supplement to ICAs from which carriers may choose to purchase services not addressed in their ICAs, or as a template for those carriers who choose not to develop detailed negotiation positions. M.D.T.E. No. 17, D.T.E. 98-57, at 21 (March 24, 2000).

3. The Consolidated Arbitrations Proceeding

In D.T.E. 04-33, the Department addressed a petition for arbitration filed by Verizon in February 2004. Consolidated Arbitrations Order at 2. In its Petition, Verizon asserted that it was necessary to amend its ICAs with approximately 130 CLECs in Massachusetts in order to

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[6] We do not agree with Verizon that CTC raises requests for relief in its Motion not included in its Complaint (Verizon Opposition at 1-3, 13). Both CTC's Complaint and Motion seek relief from what CTC asserts is Verizon's imposition of non-tariffed rates (i.e., the surcharges assessed by Verizon under its default arrangement for enterprise and four-lines-or-more UNE-P replacement services) (CTC Complaint at ¶¶ 24-26, Motion at ¶¶ 18-25), and it is this issue we discuss further on reconsideration.

implement changes in its network unbundling obligations as a result of the FCC's Triennial Review Order.[7] Id. at 3. Shortly thereafter, Verizon sought to withdraw its petition for arbitration with respect to a number of CLECs – including CTC – whose ICAs, Verizon argued, did not require an amendment in order to implement the changes in law which arose from the Triennial Review Order. Id. at 8. In the Consolidated Arbitrations Order at 8-35, the Department reviewed the contract language of the CLECs Verizon sought to withdraw. With regard to CTC, the Department concluded that the Verizon/CTC ICA contained a provision, § 1.5 of the Verizon/CTC UNE Remand Amendment (approved March 21, 2002), which negated the need for a further ICA amendment prior to Verizon's discontinuing those UNEs delisted by the FCC in the Triennial Review Order and the Triennial Review Remand Order.[8] Id. at 25. Therefore, while the Department was correct in the Dismissal Order that it would evaluate in D.T.E. 04-33 CTC's rights under its ICA to obtain UNEs post-Triennial Review Order, the Department did not evaluate in D.T.E. 04-33 the parties' rights and obligations with regard to UNE replacement services, including the default arrangement for enterprise and four-lines-or-more UNE-P replacement services at issue in CTC's Complaint in this docket.

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[7] Among these changes was the FCC's finding that denial of access to unbundled switching would not impair CLECs' ability to serve enterprise markets (i.e., customers served with a DS1 capacity or above loop). Triennial Review Order at ¶¶ 451-53.

[8] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) ("Triennial Review Remand Order").

We now evaluate the Verizon/CTC ICA to determine whether the ICA governs the default enterprise and four-lines-or-more UNE-P replacement services at issue here. Consistent with our determination in the Consolidated Arbitrations Order at 15, 25, a review of the parties' ICA reveals that § 1.5 of the Verizon/CTC UNE Remand Amendment discusses the parties' obligations when a service is no longer required to be provided as a UNE.[9] Section 1.5 expressly provides for two options that may be exercised when a UNE is delisted. First, Verizon "may terminate its provision of such UNE or combination to CTC" (Verizon/CTC UNE Remand Amendment, § 1.5). In turn, CTC may elect to purchase UNE replacement services offered by Verizon, in which case, Verizon would then have the duty to cooperate and coordinate the conversion of services to alternative arrangements "to minimize

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[9] Verizon attached relevant portions of the parties' ICA to its Answer. Section 1.5 of the UNE Remand Amendment to the ICA states, in its entirety:

> Without limiting Verizon's rights pursuant to Applicable Law or any other section of the Agreement, this UNE Remand Attachment and the Pricing Appendix to the UNE Remand Attachment to terminate its provision of a UNE or a Combination, if Verizon provides a UNE or Combination to CTC, and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such UNE or Combination, Verizon may terminate its provision of such UNE or combination to CTC. If Verizon terminates its provision of a UNE or Combination to CTC pursuant to this Section 1.5 and CTC elects to purchase other services offered by Verizon in place of such UNE or Combination, then: (a) Verizon shall reasonably cooperate with CTC to coordinate the termination of such UNE or Combination and the installation of such services to minimize the interruption of service to Customers of CTC; and, (b) CTC shall pay all applicable charges for such services, including, but not limited to, all applicable installation charges.

the interruption of service to [c]ustomers of CTC," and CTC in turn would have the obligation to "pay all applicable charges for such services, including, but not limited to, all applicable installation charges" (id.). Therefore, under the terms of the ICA, Verizon may terminate its provision of delisted UNE arrangements, and, if so, CTC may elect to purchase UNE replacement services if offered by Verizon. Pursuant to § 1.5 of the ICA, there is no obligation on Verizon's part to offer UNE replacement services when a UNE is delisted, nor an obligation on CTC's part to purchase UNE replacement services from Verizon.[10] In addition, the ICA does not include language referencing Verizon's imposing a default surcharge if CTC fails to order UNE replacement services from Verizon. Therefore, the parties' ICA does not address the services which Verizon has been providing to CTC and which CTC has been receiving since August 23, 2004, and the Department erred in dismissing CTC's Complaint on this basis.

4. Wholesale Tariffing Requirements

In its Complaint and Motion, CTC asserts that Verizon is offering its default arrangement for enterprise and four-lines-or-more UNE-P replacement services as common carriage, and that, under state law, Verizon is therefore required to file a tariff for these services with the Department (CTC Complaint at ¶¶ 23-31; CTC Motion at ¶¶ 19-24).

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[10] Pursuant to the ICA, if Verizon chooses to offer UNE replacement services, and if CTC elects to purchase them, then the obligations stated above in § 1.5(a) and (b) come into play. However, Verizon admits that CTC has not elected to purchase Verizon's UNE replacement services and states that it is only providing the services to CTC "as a courtesy to CTC and its customers" (Verizon Answer at ¶ 28; see also CTC Motion at ¶ 19 ("Verizon and CTC have not entered into an 'individually negotiated contract' for a Section 271 arrangement or any other UNE-P replacement product")).

Verizon responds that it is not required to file a tariff for the services, because its obligation to provide enterprise switching arises solely under 47 U.S.C. § 271, and only the FCC has the authority to approve Verizon's rates for those services (Verizon Answer at 9-10; Verizon Opposition at 10-13). Verizon also argues that it is providing enterprise switching services under § 271 "solely through individually-negotiated contracts based on the particular circumstances, needs and requirements of each requesting carrier" (Verizon Opposition at 3).

As an initial matter, we determine that Verizon's characterization of the way that it provides enterprise switching is misleading. Rather than offer these services "solely" through individually-negotiated contracts, Verizon admits that it is not providing enterprise and four-lines-or-more UNE-P replacement services (which necessarily includes enterprise switching) to CTC as part of an individually-negotiated commercial agreement (see id. at 6). In fact, Verizon makes clear that it has applied the default arrangement to CTC as a "voluntary accommodation" specifically because CTC and Verizon have not entered into a commercial agreement or a resale agreement (id. at 3).[11] Therefore, we conclude that Verizon has been providing services to CTC outside of a commercial agreement.

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[11] Verizon states that its default arrangement for enterprise and four-lines-or-more UNE-P replacement services was "a voluntary accommodation for CLECs that failed to make any arrangements to transition their delisted enterprise switching to other, lawful options, such as resale or commercial arrangements" (Verizon Opposition at 3). However, we are not addressing in this Order whether Verizon is required by § 271 to offer its default arrangement to CLECs in Massachusetts. Rather, we address whether Verizon must tariff its default arrangement if Verizon offers it on a common carriage basis in Massachusetts, notwithstanding whether Verizon offers the arrangement either as a "voluntary accommodation" or in response to a statutory obligation.

Moreover, the Department has previously addressed the jurisdictional issue of requiring tariffs for Verizon's wholesale services. We have stated that when Verizon offers a wholesale telecommunications service as common carriage – including those services offered by Verizon in order to comply with its obligations under 47 U.S.C. § 271 – that service must be tariffed as required by G.L. c. 159, § 19.[12] Consolidated Order, D.T.E. 03-60/04-73, at 56-57, 71 (2004); Enterprise Switching, D.T.E. 03-59-B at 7-9 (2004), 03-59-A at 8 n.9 (2004); Memorandum from Mike Isenberg, Director, Telecommunications Division to Massachusetts Telecommunications Carriers re: Clarification of Wholesale Tariff Requirements (August 12,

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[12] G.L. c. 159, § 19 states, in part:

> Every common carrier shall file with the department and shall plainly print and keep open to public inspection schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, by it within the commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form and with such detail as the department may order . . . . No common carrier shall, except as otherwise provided in this chapter, charge, demand, exact, receive or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the department and in effect at the time.

2003) ("Wholesale Tariff Memo").[13] The Department has held that the FCC's jurisdiction to determine conditions for Bell Operating Companies to enter, and continue to serve, the interLATA market, and the Department's jurisdiction to enforce the obligation of every common carrier to file tariffs can coexist. D.T.E. 03-60/04-73, at 56; D.T.E. 03-59-B at 7-9.[14] Therefore, consistent with these determinations, if Verizon is offering its default arrangement for enterprise and four-lines-or-more UNE-P replacement services as common carriage, then a Department-approved tariff for these services is required.[15]

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[13] See also Verizon New England, Inc. d/b/a Verizon Maine v. Maine Pub. Utils. Comm'n, Civil No. 05-53-B-C (D. Me. November 30, 2005) (Court denies request from Verizon for injunctive relief from orders of the Maine Public Utilities Commission which required that Verizon file wholesale tariffs for the services it provides to CLECs pursuant to § 271; Court holds that § 271 does not preempt state regulation of § 271 obligations).

[14] See also Reply Comments of the Massachusetts Department of Telecommunications and Energy, Interim Rules Order NPRM, WC Docket No. 04-313; CC Docket No. 01-338, at 13-15 (filed with the FCC October 19, 2004) (Department states that FCC should clarify that the FCC's authority under § 271 does not preempt the authority of state public utility commissions to enforce the obligations of common carriers to file tariffs for § 271 elements under state law).

[15] Verizon argues that the surcharges that it is assessing to CTC and other CLECs that have not entered into arrangements for UNE replacement services through the resale option under 47 U.S.C. § 251(c)(4), or entered into commercial agreements for UNE replacement services, are not "off-tariff or non-tariffed rates, but are a billing construct rooted firmly in [resale] rates that are tariffed" (Verizon Opposition at 11). While Verizon is correct that its resale rates are available in a Department-approved tariff – Verizon's M.D.T.E. No. 14 – the surcharge rates it is assessing for its default enterprise and four-lines-or-more UNE-P replacement services at issue in this docket are not currently contained in a tariff. Moreover, CTC has not elected to purchase services out of Verizon's resale tariff, as required by the terms of the tariff in order to purchase from it. See M.D.T.E. No. 14, §§ 3.1.1(A), 3.1.2(A).

In the Triennial Review Order at ¶ 152, the FCC outlined the following common carrier test:

> Generally stated, a common carrier holds itself out to provide service on a nondiscriminatory basis. A private carrier, on the other hand, decides for itself with whom and on what terms to deal. Common carrier status has been assessed by the [FCC] and the courts by the application of the two-part NARUC test: (1) whether the carrier "holds himself out to serve indifferently all potential users"; and (2) whether the carrier allows customers to "transmit intelligence of their own design and choosing" [quoting National Ass'n. of Regulatory Util. Commrs. v. Federal Communications Comm., 533 F.2d 601, 608-609 (D.C. Cir. 1976) ("NARUC II"); National Ass'n of Regulatory Util. Commrs. v. Federal Communications Comm., 525 F.2d 630, 644 (D.C. Cir. 1976) ("NARUC I")].

The Department has also relied on the NARUC framework and has stated that "[t]he Department believes that the common carrier test applied in the NARUC I line of cases provides a rational analysis that is consistent with Massachusetts common law and with the Department's enabling statute . . . ." Wholesale Tariff Memo at 6.[16] More specifically, in D.T.E. 03-60/04-73, discussing Verizon's June 2004 statement that it would begin to bill CLECs' UNE-P arrangements at a rate equivalent to the resale rate "in order to prevent service disruption" (see Verizon TT 04-49 Tariff Transmittal Letter, at 2 n.3 (filed with the Department June 23, 2004)), the Department stated:

> Verizon has not filed this replacement rate in the form of a tariff. We note that few carriers would be affected by removing enterprise switching from M.D.T.E. No. 17, because most carriers . . . obtain enterprise switching pursuant to their interconnection agreements, and thus the terms available to . . . the CLECs will depend upon the results of their ongoing negotiations and the Department's ongoing

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[16] The Department has also stated that "[b]ecause the test of common carriage turns on the manner in which services are offered, a carrier must presently offer telecommunications services in order to be considered a common carrier." Fiber Technologies, Inc., D.T.E. 01-70, at 26-27 (August 20, 2004).

> arbitration proceeding, D.T.E. 04-33, not upon the terms available through tariffs. Even so, we find that Verizon will be offering enterprise switching as common carriage to those remaining carriers, because Verizon's statement makes an offer to continue to serve carriers indiscriminately, albeit at the resale rate.

D.T.E. 03-60/04-73, at 70-71 (emphasis added). The Department then instructed Verizon to file replacement rates for its enterprise switching elements by January 31, 2005. Id. at 72. Verizon did not do so.[17]

Given our conclusions (1) that Verizon must file wholesale tariffs for services it offers as common carriage, and that the Department is not preempted by § 271 in requiring Verizon to do so (see D.T.E. 03-60/04-73, at 56-57, 71; D.T.E. 03-59-A at 8 n.9, D.T.E. 03-59-B at 7-9); (2) that when Verizon offers its enterprise switching services at a resale-equivalent rate as a default arrangement, Verizon is offering the services as common carriage (D.T.E. 03-60/04-73, at 70-71); and (3) that Verizon must file tariffs for enterprise switching services (D.T.E. 03-60/04-73, at 72), we determine that Verizon was obligated to file a tariff for its default arrangement for enterprise and four-lines-or-more UNE-P replacement services (i.e., the services at issue in CTC's Complaint) as of January 31, 2005, at the latest, and has

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[17] The Department also directed Verizon to file new tariffs for mass market switching, UNE combinations, high capacity loops, and dedicated transport where Verizon ceases to provide those elements at TELRIC but continues to offer those network elements to CLECs. D.T.E. 03-60/04-73, at 57. In response to these directives, Verizon indicated that the Department lacked authority to require wholesale tariffs for § 271 elements, and that, in any event, Verizon intended to offer § 271 elements only through individually-negotiated commercial agreements, and not as common carriage. Letter from Bruce P. Beausejour to Mary L. Cottrell, D.T.E. 03-59, 03-60, 04-73 (January 4, 2005). In sum, Verizon declined to file tariffs for its enterprise switching services and other § 271 services, presenting the identical arguments that it has put forth in this proceeding.

not done so. Accordingly, Verizon is required to file tariffs for its default arrangement for enterprise and four-lines-or-more UNE-P replacement services within 20 days of the issuance of this Order.[18]

Finally, in order to assist the Department in its determination of whether Verizon is precluded from charging CTC for Verizon's non-tariffed default arrangement for enterprise and four-lines-or-more UNE-P replacement services until a wholesale tariff for these services is on file and approved by the Department pursuant to G.L. c. 159, § 19,[19] we request that Verizon identify any theories of recovery that would be applicable consistent with our grant of statutory authority. Although suggestive of an equitable remedy not characteristic of administrative law and economic regulation under a statutory scheme, quantum meruit and quasi-contract may be pertinent where one party (the obligor) is contractually entitled to terminate an obligation but constrained to do so only in a manner that avoids discommoding the public served by the obligee, and the obligee accepts continued performance of the former obligation. The question of reforming or supplementing agreements is not common, but not unknown in Department precedent. See Massachusetts Electric Company, D.T.E. 06-5, at 5-6 (2006); but see Town of Framingham, D.T.E. 02-46, at 8 n.9 (February 28, 2003).

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[18] The Department will address Verizon's failure to tariff other § 271 services as required by D.T.E. 03-60/04-73, at 57, in a subsequent Order in the D.T.E. 03-60 docket.

[19] Cf. Letter from Mike Isenberg, Director, Telecommunications Division to Jay E. Gruber, Senior Attorney, AT&T Communications of New England, Inc. (January 21, 2004) (discussing AT&T's provision of Inmate Calling Services at rates that exceeded the tariffed Inmate Calling Services rate cap; ordering AT&T to cease charging non-compliant rates; requiring AT&T to credit customers who were overcharged during period of AT&T's non-compliance).

We stress that any such theories of recovery may not be based on assertions that the Department lacks authority to require wholesale tariffs for network elements provided under § 271 (now the "rule of the case" here), or that Verizon only offers arrangements for these elements through individually-negotiated commercial agreements, both of which we have previously discussed in this and other Orders. Verizon's filing is due within 20 days of the issuance of this Order; CTC's response is due within 14 days following Verizon's filing.

IV. ORDER

Accordingly, after due notice, and consideration, it is

ORDERED: That CTC's Motion for Reconsideration of the Department's Dismissal Order dated March 3, 2005 is granted in part, as discussed herein; and it is

FURTHER ORDERED: That Verizon must file tariffs for its default arrangement for enterprise and four-lines-or-more UNE-P replacement services within 20 days of the issuance of this Order; and it is

FURTHER ORDERED: That Verizon may provide additional briefing on the question of recovery for non-tariffed services rendered to CTC within 20 days of the issuance of this Order; and it is

FURTHER ORDERED: That CTC may respond within 14 days of Verizon's filing; and it is

FURTHER ORDERED: That Verizon and CTC shall comply with all other directives herein.

By Order of the Department,

_____/s/_____
Judith F. Judson, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Paul G. Afonso, Commissioner

_____/s/_____
Brian Paul Golden, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.